(5)

No. 04-1327

IN THE

Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

REPLY BRIEF

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I. Review Of Petitioner's Constitutional Challenge To South Carolina's Approach To Third-Party Guilt Evidence Is Warranted.

A. Petitioner's Constitutional Challenge To South Carolina's Approach To Third-Party Guilt Evidence Was Preserved In The State Courts.

South Carolina's assertion that Petitioner never raised his federal constitutional challenge to South Carolina's approach to third-party guilt evidence in the state courts (Opp. at 3-6) is wrong. The trial record and Petitioner's briefs in the South Carolina Supreme Court show that Petitioner raised this challenge below, preserving the federal claim for this Court's review.[1]

Throughout trial, Petitioner sought to establish his Sixth and Fourteenth Amendment rights to present evidence of third-party guilt. First, in a pretrial brief urging the trial court to admit the evidence, Petitioner argued that he had a "constitutional right to present witnesses" who could testify to the guilt of Jimmy White because to "permit a jury to determine [Petitioner's] fate without weighing such evidence would . . . 'defeat the ends of justice.'" (Pet. Supp. App. 1a-2a [quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)].) Then, during the trial, when the court ruled that the third-party guilt evidence could not be introduced to impeach testimony of police officers with respect to the thoroughness of their investigation, Petitioner objected based on *Washington v. Texas*, 388 U.S. 14 (1967), one of the cases on which Petitioner relies in this Court (Pet. at 16, 17, 18). In particular, Petitioner argued that, under *Washington*, the exclusion of this evidence violated his constitutional rights to a fair trial, to present a complete defense, and to effective cross-examination. (Pet. Supp. App. 3a-4a.) Following the end of the State's case at the guilt phase, Petitioner requested reconsideration of the exclusion of third-party guilt evidence as part of his defense. In so doing, Petitioner argued that South Carolina's approach to third-party guilt evidence could "not be applied mechanistically" so as to violate his Fourteenth Amendment

[1] Petitioner has reproduced relevant portions of the trial record and his state supreme court briefs in a "Supplemental Appendix."

due process right to a fair trial. (Pet. Supp. App. 5a [quoting *Chambers*, 410 U.S. at 284].)

In his appeal to the South Carolina Supreme Court, Petitioner presaged the constitutional claims he is raising in this Court. Petitioner argued that the exclusion of the third-party guilt evidence was an "arbitrary misapplication of the hearsay rule" that "clearly violated" *Chambers*; an unconstitutional application of *State v. Gregory*, 16 S.E.2d 532 (S.C. 1941); a violation of Petitioner's "sixth amendment right to a jury trial"; a violation of Petitioner's federal constitutional right to be convicted beyond a reasonable doubt; and a violation of Petitioner's federal constitutional right "to present a complete defense." (Pet. Supp. App. 19a, 23a-24a.)[2]

The State misapprehends this Court's standards for assessing whether a federal claim was preserved in state court.[3] Under those standards, one is not required to cite "book and verse" in order to preserve a federal issue. *Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982). Indeed, as the Court admonished long ago on this score:

> No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record

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[2] While these arguments appear under a heading of Petitioner's Final Brief that refers to errors at the penalty phase, the arguments themselves primarily address the constitutional violation that occurred at the guilt phase when Petitioner was barred from presenting evidence of third-party guilt. At any rate, Petitioner set forth his constitutional challenge to the exclusion of evidence of third-party guilt in three sections of his Final Brief that address errors in the guilt phase. At the end of each of those sections, Petitioner argued that the exclusion of that evidence was "in violation of the due process clause of the fifth amendment and in violation of the sixth, eighth and fourteenth amendments to the United States Constitution. . . ." (Pet. Supp. App. 10a-15a.) Furthermore, Petitioner's Final Reply Brief incorporated by reference the constitutional arguments with respect to the exclusion of third-party guilt evidence that Petitioner advanced in his Final Brief, and, in so doing, drew no distinction between exclusion of the evidence at the guilt phase and exclusion of the evidence at the penalty phase. (Pet. Supp. App. 28a.)

[3] The State does not argue that, as a matter of South Carolina rules of procedure, Petitioner failed to preserve his federal constitutional challenge to South Carolina's approach to third-party guilt evidence.

> as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928). Echoing this theme, the Court observed earlier this year that a party "can easily indicate the federal law basis for his claim in a state-court petition or brief . . . by citing in conjunction with the claim the federal source of law on which he relies." *Howell v. Mississippi*, 125 S. Ct. 856, 859 (2005). In short, so long as a specific right was claimed in state court, and the federal Constitution was relied on as the source of that right, the federal claim was preserved. *See, e.g., Eddings*, 455 U.S. at 113 n.9; *Beck v. Alabama*, 447 U.S. 625, 630 n.6 (1980); *Stanley v. Illinois*, 405 U.S. 645, 658 n.10 (1972).

Petitioner plainly satisfied that standard. Both in the trial court and in the South Carolina Supreme Court, Petitioner made arguments on the constitutionality of the exclusion of third-party guilt evidence that were more than sufficient to preserve the federal claim for this Court's review.[4]

The cases on which the State relies are inapposite. In virtually every one, the petitioner's state court briefs failed to identify any federal constitutional provision as the source of the right to be vindicated. *Howell*, 125 S. Ct. at 859; *Webb v. Webb*, 451 U.S. 493, 496 (1981); *Herndon v. Georgia*, 295 U.S. 441, 442-43 (1935); *Bowe v. Scott*, 233 U.S. 658, 664-65 (1914); *New York C. & Hudson River R.R. Co. v. City of New York*, 186 U.S. 269, 272 (1902); *F.G. Oxley Stave Co. v. Butler County*, 166 U.S. 648, 653 (1897).[5]

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[4] While the South Carolina Supreme Court did not address Petitioner's federal constitutional challenge to the exclusion of the third-party guilt evidence he sought to introduce at trial, Petitioner's briefs afforded that court "a fair opportunity to address the federal question," thereby defeating any notion that the question was not presented below. *Adams v. Robertson*, 520 U.S. 83, 87 (1997).

[5] *Adams* lends no support to the State. In that case, petitioners sought review in this Court of a due process challenge to state court approval of a class action settlement that purportedly did not provide constitutionally sufficient opt-out rights to class members. This Court held that the challenge had not been preserved below because there, petitioners' arguments had focused on the due process rights of non-class members. *Id.* at 88-89. As the

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B. Review Is Warranted To Delineate The Constitutional Parameters Of State Rules On Evidence Of Third-Party Guilt.

South Carolina asserts that Petitioner is asking this Court to do away with state rules on the admissibility of third-party guilt evidence and to impose uniform national rules. (Opp. at 7-8.) That is not so. The Petition seeks only clarification of the federal constitutional boundaries of state evidentiary rules on the admissibility of such evidence in the face of South Carolina's extreme (and unconstitutional) approach. (Pet. at 22-23.) Indeed, the differences nationwide between state rules (that South Carolina itself recognizes, Opp. at 7-8) only reinforce the need for clarification of those boundaries.[6]

Many states do not have a special rule governing the admissibility of third-party guilt evidence; instead, courts in these states determine whether such evidence is admissible by applying state versions of Federal Rule of Evidence 401, which provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."[7] Under this standard (in contrast to South Carolina's), the evidence of third-party guilt that Petitioner sought to introduce would have been admissible: the trial court found that this evidence was sufficiently credible to show that Jimmy White confessed multiple times to the crime, generally fit the description of the attacker, gave a false alibi, had a propensity for older women, and was violent. (Pet. App. at 20a-21a.)

(Cont'd)

Court put it, petitioners failed to present their federal claim with "fair precision and in due time." *Id.* at 88. That is simply not the case here.

[6] The Brief of *Amicus Curiae* Certain Professors of Evidence in support of the Petition canvasses the variety of approaches to the admissibility of third-party guilt evidence across the country. We simply illustrate the point below.

[7] *State v. Gibson*, 44 P.3d 1001, 1004 (Ariz. 2002) (en banc); *People v. Hall*, 718 P.2d 99 (Cal. 1986); *Rivera v. State*, 561 So. 2d 536, 539 (Fla. 1990); *Joyner v. State*, 678 N.E.2d 386, 389 (Ind. 1997); *People v. McCracken*, 431 N.W.2d 840, 842 (Mich. Ct. App. 1988); *State v. Holterman*, 687 P.2d 1097, 1101 (Or. Ct. App. 1984); *State v. Powers*, 101 S.W.3d 383, 395 (Tenn. 2003).

Second, many states apply a heightened standard for assessing the admissibility of third-party guilt evidence, but (unlike South Carolina) do so without comparing that evidence to the quality or quantity of the evidence against the defendant.[8] In fact, in these states, courts have ordered new trials for defendants convicted without the benefit of a proffered third-party guilt defense, even though significant direct and/or forensic evidence supported conviction.[9]

Finally, there are South Carolina and at least one other state that stand at the far end of the spectrum. These states exclude third-party guilt evidence where such evidence does not create a reasonable inference of innocence when compared to the state's evidence, including the forensic evidence. (Pet. at 22 & n.13.)[10] Simply put, under South Carolina's approach, Petitioner was barred from presenting evidence that he could have presented had he been tried in all but a few other states. Given that the Constitution guarantees "criminal defendants a meaningful opportunity to present a complete defense," *Crane v. Kentucky*, 476 U.S. 683, 689 (1986) (internal quotations omitted), the Court should grant the Petition and determine the permissible contours of state evidentiary rules that block the introduction of evidence that, in many cases, could be the lynchpin of a complete defense -- evidence that a third party is the real culprit.[11]

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[8] *See, e.g., State v. Marsh*, 102 P.3d 445, 454-57 (Kan. 2004); *State v. Israel*, 539 S.E.2d 633, 634 (N.C. 2000).

[9] *See, e.g., Johnson v. Singletary*, 647 So. 2d 106 (Fla. 1994); *Marsh*, 102 P.3d at 454-57; *State v. Barriner*, 111 S.W.3d 396 (Miss. 2003); *Israel*, 539 S.E.2d at 634-36.

[10] *State v. Williams*, 593 N.W.2d 227, 234 (Minn. 1999).

[11] The seven pages the State devotes to denigrating Petitioner's third-party guilt evidence (Opp. at 18-25) overlooks the trial court's finding on the strength of this evidence (Pet. App. at 20a-21a), which the state supreme court did not disturb (Pet. at 14). The State maintains that Petitioner's third-party guilt evidence would not have "confront[ed]" the evidence against him. (Opp. at 15.) That contention has no merit. Petitioner either committed the crime, or he did not and someone else did. Evidence that another person, and not Petitioner, was the culprit surely would have confronted the State's evidence that Petitioner was guilty. Furthermore, the evidence of third-

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II. Review Of Petitioner's Constitutional Challenge To The Prosecutor's Reference In Closing Argument To The Lack Of Evidence Of Third-Party Guilt Is Warranted.

A. There Is No Procedural Barrier To This Court's Review Of Petitioner's Constitutional Challenge To The Prosecutor's Reference In Closing Argument To The Lack Of Evidence Of Third-Party Guilt.

The State asserts that Petitioner's failure to object immediately after the prosecutor's remarks in closing argument on the lack of evidence of third-party guilt amounts to a procedural default under South Carolina law barring this Court's review of Petitioner's claim that those remarks cannot be squared with *Simmons v. South Carolina*, 512 U.S. 154 (1994), and *Skipper v. South Carolina*, 476 U.S. 1 (1986). (Op. at 26-27.) The State ignores entirely, however, the venerable principle that unless a supposed state procedural rule "is strictly or regularly followed" by the courts of the state, failure to comply with that rule does not constitute a procedural default precluding review in this Court of federal constitutional questions. *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982). The cases on which the State relies do not show that South Carolina courts strictly or regularly require defense counsel in criminal cases to register an objection to a statement in the prosecutor's closing argument immediately after the statement is made by interrupting the prosecutor in the midstream, instead of waiting until the end of the closing argument.

(Cont'd)

party guilt would have confronted the State's evidence by bolstering critical elements of his defense theory – namely, that the forensic evidence was tainted; that the police investigation was not rigorous; and that the prosecution rushed to judgment in charging and trying him. (Pet. at 20.) The State's reliance on *United States v. Scheffer*, 523 U.S. 303 (1998) (Opp. at 12), is misplaced. In *Scheffer*, the Court upheld the exclusion of polygraph evidence petitioner sought to introduce. In addition to concerns about the scientific reliability of such evidence, the Court expressed concern that its admission could "diminish the jury's role in making credibility determinations." *Id.* at 313. By contrast here, that core jury function would have been served through the introduction of evidence of third-party guilt. Specifically, the jury would have been the "lie detector," *id.* at 313, and weighed the credibility of Petitioner's witnesses who spoke to third-party guilt, against the credibility of the State's witnesses.

The State's reliance on *State v. Williams*, 223 S.E.2d 38 (S.C. 1976), *State v. Franklin*, 456 S.E.2d 357 (S.C. 1995), and *State v. Wiggins*, 500 S.E.2d 489 (S.C. 1998), is puzzling. *Williams* did not even involve an objection to statements made by the prosecutor in closing argument. 223 S.E.2d at 44. Rather, the issue there was whether the defendant was deprived of effective assistance of counsel because of his attorney's failure to ensure that there was a record of what the prosecutor said in his closing argument. *Id. Franklin* and *Wiggins* are equally irrelevant. In both cases, the defendants made no objections whatsoever at any point at trial to the prosecutors' closing arguments. *Franklin*, 456 S.E.2d at 363; *Wiggins*, 500 S.E.2d at 496.

State v. Humphries, 479 S.E.2d 52 (S.C. 1996), is of no utility to the State either. In that case, the defendant failed to preserve his objection to the prosecutor's use of victim impact statements in closing because the defendant had objected to the statements "only on the basis that the defendant had not received prior notice that [this evidence] would be introduced," and had "made no contemporaneous objections relating to the amount of victim impact evidence or the way in which it was used." *Id.* at 56. *Humphries* says absolutely nothing, however, about any requirement in South Carolina law that a defendant must object to a statement in a prosecutor's closing argument as soon as the statement is made.[12]

State v. McIver, 120 S.E.2d 393 (S.C. 1961), actually undermines the State's position. In *McIver*, the South Carolina Supreme Court held that a defendant's objection to statements in a prosecutor's closing argument came too late because it was made in a motion for new trial after the trial was over. *Id.* at 397. The court did not mandate, however, that such objections be levied immediately after the statements are made. Indeed, as the Petitioner pointed out (Pet. at 28), *McIver* is one

[12] The same is true of *State v. Patterson*, 482 S.E.2d 760 (S.C. 1997). That decision notes that an objection to statements in the prosecutor's closing argument was made and holds that the statements were not prejudicial, but it does not say when the objection was made or when objections to statements in a prosecutor's closing argument must be made. *Id.* at 766.

of several cases in which the South Carolina Supreme Court has indicated that an objection to a prosecutor's closing argument need only be sufficiently contemporaneous so as to give the trial judge time to issue a curative instruction. 120 S.E.2d at 397 (objection to closing argument should have been made before the jury was charged so that the court have declared a mistrial or instructed the jury to disregard improper portions of the close).

The State cites only one case, *State v. Rabon*, 272 S.E.2d 634 (S.C. 1980), in which the South Carolina Supreme Court has suggested that criminal defendants must object to a statement in a prosecutor's closing argument immediately after the statement is made.[13] But a single case hardly reflects strict or regular adherence to the purported procedural rule that the State invokes. In any event, the Petition acknowledged *Rabon* (Pet. at 28), and observed that even in that case, as in *McIver*, the South Carolina Supreme Court said that the purpose of the contemporaneous objection requirement is to ensure that an improper statement in a prosecutor's closing argument is promptly called to the trial judge's attention "such that a corrective instruction, if needed, may be given." (Pet. at 28 [quoting *Rabon*, 272 S.E.2d at 636].) That purpose was met here. As the Petitioner showed (Pet. at 29), in objecting to the prosecutor's closing argument as soon as it was completed, Petitioner's counsel afforded the trial judge the opportunity to issue a curative instruction before the jury was charged.[14]

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[13] The State cites *Varnadore v. Nationwide Mutual Ins. Co.*, 345 S.E.2d 711 (1986), but it is a civil case and does not speak to any requirement imposed on criminal defendants by South Carolina law to interpose objections to statements in a prosecutor's closing argument right after the statements are uttered.

[14] The State also suggests that Petitioner failed to preserve his constitutional objection to the prosecutor's closing argument because the objection below was premised on *Doyle v. Ohio*, 426 U.S. 610 (1976), and *Griffin v. California*, 380 U.S. 609 (1965), rather than on *Simmons* and *Skipper*. (Opp. at 29.) The State is again mistaken. In determining whether a federal claim was preserved, this Court looks to the constitutional right invoked, not the precise argument in support of the claim of a violation of that right. *See Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899) ("Parties are not confined here to the same arguments which were advanced in the courts

(Cont'd)

B. The Prosecutor's Remarks In Closing Argument On Petitioner's Failure To Present Evidence Of Third-Party Guilt Cannot Be Reconciled With *Simmons* and *Skipper*.

The State contends that *Simmons* and *Skipper* are inapposite. (Opp. at 28). While it is difficult to discern the distinction that it is trying to draw, the State apparently is saying that the third-party guilt evidence that Petitioner was barred from introducing was not "competent and relevant," unlike the evidence that the defendants in *Simmons* and *Skipper* sought to introduce. (Opp. at 28.) This distinction is chimerical.

The trial court determined that the third-party guilt evidence Petitioner sought to introduce was sufficiently credible such that the jury could conclude that somebody else, Jimmy White, committed the crime. (Pet. App. at 20a-21a.) At the State's urging, however, the trial court concluded that this evidence was inadmissible under South Carolina's rule on third-party guilt evidence. (Pet. App. at 24a.) The South Carolina Supreme Court did not disturb the trial court's determination that the third-party guilt evidence was credible. (Pet. at 14.) If, as Petitioner maintains, the South Carolina rule on third-party guilt evidence cannot be reconciled with this Court's precedents, then Petitioner was unconstitutionally precluded, at the State's urging, from presenting credible evidence in his defense. In sum, there is no constitutionally meaningful distinction between the competence of the evidence excluded in this case and the competence of the evidence excluded in *Simmons* and *Skipper*.

(Cont'd)
below upon a federal question there discussed."); *see also* Stern & Gressman, *et al.*, *Supreme Court Practice* 191 (8th ed. 2002). Like *Simmons* and *Skipper*, *Doyle* involved a due process challenge to remarks in a prosecutor's closing argument on the absence of evidence (in that case, the absence of evidence from defendant himself following his invocation of his *Miranda* rights). 426 U.S. at 610. In the South Carolina Supreme Court, Petitioner cited *Doyle* and argued that the prosecutor's remarks in closing argument on the absence of third-party guilt evidence violated his due process right. (Pet. Supp. App. 15a-17a.) Petitioner's reliance on the Due Process Clause in challenging the prosecutor's remarks preserved the due process challenge that Petitioner is making here under *Simmons* and *Skipper*.

In his closing argument, the prosecutor compounded the constitutional violation when he exploited the wrongful exclusion of the third-party guilt evidence by trumpeting its absence.[15] In that regard, South Carolina's conduct here mirrors its conduct that the Court condemned in *Simmons* and *Skipper*. In those two cases, the State successfully argued for the exclusion of what this Court said was competent evidence on a critical issue (the defendants' future dangerousness), and then, in closing argument, the State seized on its victory by highlighting the defendants' failure to introduce that very evidence. In both cases, this Court held that the prosecutors' references in their closing arguments to the missing evidence violated the defendants' due process right of fair rebuttal to evidence presented against them. *Simmons*, 512 U .S. at 166 n.5; *id.* at 177 (O'Connor, J., concurring in the judgment); *Skipper*, 476 U.S. at 4-5 & n.1; *id.* at 10 (Powell, J., concurring in the judgment). Similarly, here, the prosecutor's remarks on the missing evidence of third-party guilt violated Petitioner's due process right to rebut evidence presented against him.

Respectfully submitted,

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[15] The State's extended recitation of South Carolina law governing the scope of closing arguments and the extent to which prosecutors may comment on the defendant's evidence (Opp. at 28-29) is wholly irrelevant to the federal constitutional question posed here: whether the prosecutor's reference to the lack of evidence of third-party guilt is inconsistent with *Simmons* and *Skipper*.

APPENDIX

APPENDIX A

STATE v. HOLMES

PRETRIAL BRIEFING URGING THE ADMISSION OF DEFENDANT'S THIRD-PARTY GUILT EVIDENCE

STATE OF SOUTH CAROLINA
IN THE COURT OF GENERAL SESSIONS
FOR THE SIXTEENTH CIRCUIT

90-GS-46-1196, 1197, 1198, 1200

THE STATE OF SOUTH CAROLINA,
COUNTY OF YORK

v.

BOBBY LEE HOLMES,

Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO ADMIT EVIDENCE OF THIRD-PARTY GUILT AND OF WILLFULLY INADEQUATE INVESTIGATION BY THE YORK POLICE DEPARTMENT

* * *

Second, to prevent a jury from considering this reliable and compelling evidence of Mr. White's guilt would certainly "defeat the ends of justice." *Id.* Mr. White has confessed on

at least five separate occasions to committing the attack at issue. As noted above, each confession of Mr. White serves to corroborate the others. *See id.* at 300. In addition to Mr. White's numerous confessions, the defense also has substantial corroborating evidence demonstrating that Mr. White had the opportunity to commit the crime at issue, had motive to commit the crime, fit the description of the attacker better than Mr. Holmes did, and lied about his whereabouts on the morning of the attack. Furthermore, Mr. Holmes seeks to introduce evidence that the York Police Department's failure to adequately investigate Mr. White can be explained by the fact that Mr. White was serving as a confidential informant for Officer Smith. To permit a jury to determine Mr. Holmes's fate without weighing such evidence would most definitely "defeat the ends of justice."[17]

* * * *

17. Obviously, a defendant's right to present relevant testimony is not without limitation and must be balanced against "other legitimate interests in the criminal trial process." *Chambers*, 410 U.S. at 295. However, the restriction of a criminal defendant's constitutional rights "calls into question the 'integrity of the fact-finding process.'" *id.*, and "may not be arbitrary or disproportionate to the purposes [such rights] are designed to serve." *Rock v. Arkansas*, 483 U.S. 44, 56 (1987). The United States Supreme Court has recognized that the denial or significant diminution of the right to confront and cross-examine witnesses "requires that the competing interest be closely examined." *Chambers*, 410 U.S. at 295.

* * * *

APPENDIX B

STATE v. HOLMES TRIAL TRANSCRIPT MARCH 19, 2001

PRESERVATION OF CONSTITUTIONAL OBJECTIONS TO THE THE EXCLUSION OF THIRD-PARTY GUILT EVIDENCE FOR PURPOSES OF IMPEACHMENT DURING THE GUILT PHASE OF TRIAL

[Commencing at page 2713]

* * *

MR. NETTLES: Okay, that's fine. That's just what I need to know. The court has ruled that I can't discuss in any way, shape or form the investigation of anyone else in relation to the commission of this crime?

THE COURT: That's the ruling.

MR. NETTLES: Okay.

THE COURT: And for your benefit, and I don't think that this would be considered a motion in limine, because we are in the middle of a trial --

MR. NETTLES: Right.

[2714] THE COURT: -- and been proffered.

MR. NETTLES: Right.

THE COURT: I feel this is the time to make it and the time --

MR. NETTLES: Yes, sir.

Appendix B

THE COURT: -- to rule, and I don't feel like you need to -- I think you are protected. I don't think that you need to keep turning to me every time and say, Your Honor --

MR. NETTLES: It is.

THE COURT: -- here is where I would ask one of those questions.

MR. NETTLES: Thank you.

THE COURT: Because I just think that's not what the courts require, but I don't want you to be in a situation where you go up and the court says, well, the judge just made a preliminary ruling. This isn't a preliminary ruling. This one is long, long and hard thought out to the degree I'm capable of it, well thought out, and that is the ruling.

MR. NETTLES: Okay. Your Honor, I would like, for the record, that by not allowing this, it violates Mr. Holmes right to a fair trial secured by -- to my client by the Due Process Clause of the United States, secured by the state and federal [2715] constitutional right to present a complete and adequate defense, as contained in Washington v. Texas, and the right to effective cross-examination under the right to confront them with the state and with the federal constitution. Thank you.

* * *

Appendix B

STATE v. HOLMES TRIAL TRANSCRIPT

MARCH 21, 2001

TRIAL COURT'S RECONSIDERATION OF ITS EXCLUSION OF THIRD-PARTY GUILT EVIDENCE DURING THE GUILT PHASE OF TRIAL

[Commencing at page 3638]

* * *

(Proceedings reconvened)

THE COURT: All right. On the issue of the [3639] third-party guilt matter, does defense have anything further to add to it?

MR. KRELL: Yes, Your Honor.

* * *

[3646] MR. KRELL: Well, Your Honor, under Chambers v. Mississippi, the United States Supreme Court held that "a rule of evidence" -- and here we're talking about the Gregory standard -- "may not be applied mechanistically to defeat the ends of justice," Your Honor.

* * *

[3648] That is not our situation, Your Honor. You are at the threshold of deciding the Gregory issue. And [3649] we have, as you well know, because I know that you have reviewed this recently, not only four confessions, which tend to corroborate each other, as the United States Supreme Court

said in Chambers v. Mississippi. The court said "the sheer number of independent confessions provided additional corroboration for each." In Chambers there were four confessions, coincidentally.

Not only do we have those four confessions that are corroborating each other, Your Honor, but as you noted in your order, we have at least three witnesses who put Jimmy White in the proximity of Mary Stewart's apartment near the time of the attack.

In addition, we have James White's statement to the police that he got a ride home with Junior Lytle that night. And we have Junior Lytle saying I did not do that. And the court said that Jimmy White -- if you put -- if he is put up for relevant testimony would be subject to impeachment on that issue, based on Josh Lytle's testimony.

In addition, we have the fact that Jimmy White arguably fits the description of the attacker better than Bobby Lee Holmes. We have a photograph of Bobby Lee Holmes and this is not longish hair, Your [3650] Honor. Jimmy White had a shag cut, or what some people call the box cut at that time. He didn't have hair that looks like this, which is very similar to the hair that Bobby Lee Holmes has today.

Your Honor, with all due respect, the evidence that we have presented to you pointing to Jimmy White is not what you called at the beginning of the -- what you were worried about at the beginning of this trial of a potential wild goose chase. I understand the court's reservations about allowing a defendant to go on a wild goose chase. Your Honor, this is

not a wild goose chase. And consistent with the Sixth, Fourteenth, Fifth Amendment Rights to the United States Constitution and the corresponding Articles of the South Carolina Constitution, Article 1, Section 3, consistent with the Fourteenth Amendment, Bobby Lee Holmes' due process rights to a fair trial and the offer that you just gave him, Your Honor. In South Carolina Constitution Article 1, Section 14, it would be a violation of Bobby Lee Holmes' rights to not let a jury hear that evidence before deciding whether he is guilty of capital murder and potentially sentencing him to death, Your Honor. That would be -- that would be a miscarriage of justice, Your Honor.

* * *

[3655] THE COURT: As I said, this is a very difficult decision. I'm going to disallow the testimony. I do not believe under Rule 804(b)(3) or 801(d)(1)(a) that it can come in under either of those rules. And like in Cooper and the other cases, in Gregory, we sort of dance around these Gregory standard and other things, but in Cooper, which was a 1999 case, there is a statement dealing with the individual who wanted to testify about overhearing the statement, and I know it was only one, "but aside from Nelson's assertion there was no credible evidence linking Gilmore to the victim's murder." So I know when we [3656] talk about the trustworthiness of the statements, that's one issue, but here there is no evidence that tends to clearly point out that Mr. White was guilty of the crime. And that under the two rules that it can't come in evidentiary-wise, but also substantive-wise as to third-party guilt.

MR. KRELL: Your Honor, I just want to make sure that the record is straight. Your holding is that Rule 804 and 801 are essentially trumping the Constitutional Rights of Bobby Lee Holmes, is that right, under Chambers v. Mississippi?

THE COURT: Well, I'm just saying those are the rules and our court has interpreted them, and particularly that they are the Rules of Evidence. I'm not going to say they are trumping anything. I'm just making a ruling.

MR. KRELL: Thank you Your Honor.

* * *

[3709] THE COURT: All right.

And just for the record, this third-party guilt issue, I promise we are going to continue to look at it, but I have gone back and read Chambers [3710] v. Mississippi, because I certainly didn't want to be in the position to having to trump the United States Supreme Court. Obviously they hold the trump card, but in that I find the case, that case, factually dramatically different from the case that we have here. And that case ends by stating and reaching this judgment, that is, allowing the third-party guilt in that particular case, "we establish no new principles of Constitutional law, nor do our holdings signal any diminution in respect traditionally accorded to the state in establishment and implementation of their own criminal trial rulings and procedures. Rather we hold quite simply that under the facts and circumstances of this case, the ruling of the trial court strives so he can get a fair trial."

Appendix B

In that case there was an eyewitness. There was a repudiated confession. Proof of ownership of a well lot. So I just -- my comfort level is a little better, Mr. Krell.

* * * *

APPENDIX C

PETITIONER'S FINAL BRIEF TO THE SOUTH CAROLINA SUPREME COURT

CONSTITUTIONAL ARGUMENTS REGARDING THE EXCLUSION OF THIRD-PARTY GUILT EVIDENCE DURING THE GUILT PHASE OF TRIAL

* * *

QUESTION II

The lower court erred in denying appellant the right to present evidence of third party guilt in the case.

* * *

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* * * [8]

The lower court erred in ruling that appellant's third party guilt evidence was inadmissible at trial in violation of the due process clause of the fifth amendment and in violation of the sixth, eighth and fourteenth amendments to the United States Constitution and article 1, § 3, § 14 and § 15 of the South Carolina State Constitution.

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8. In suppressing the Jimmy White evidence, the court partially relied upon *State v. Gay*, 541 S.E.2d 541 (S.C. 2001), in which the defendant failed to satisfy the *Gregory* standard for the introduction of evidence of the guilt of a third party. However, *Gay* is distinguishable from the present case in three important ways. *See* 2001 ROA pp. 3640-42. First, the third party in *Gay never confessed to the crime charged.* The third party in that case admitted that he argued with, hit, and had sex with the victim on the day she was found. That statement was not a confession to the crime charged (murder) and was therefore not inconsistent with the guilt of the defendant. In contrast, the defense in the present case has proffered credible testimony that Jimmy White has confessed to the crime charged to multiple witnesses, along with other corroborating evidence linking Mr. White to the crime. Second, *Gay* is distinguishable from the present case because, as described below, the state in the present case failed to conduct an adequate investigation into Jimmy White: for instance, the state failed to test Jimmy White's clothes for the victim's blood, and failed to compare Jimmy White's shoes with an unknown footprint at the scene of the crime. Third, *Gay* is distinguishable from the present case because the evidence pointing to the defendant in *Gay* was far more reliable than that pointing to appellant in this case.

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QUESTION III

The lower court erred in denying appellant the right to call Jimmy White as a witness in order to present impeachment evidence in support of his third party guilt defense.

* * *

The lower court erred in failing to allow the defense to present impeachment evidence on the issue of third party guilt in violation of the due process clause of the fifth amendment to the United States Constitution, and in violation of the sixth, eighth and fourteenth amendments to the United States Constitution and article 1, § 3, § 14 and § 15 of the South Carolina State Constitution.

QUESTION IV

The lower court erred in denying appellant the opportunity to impeach state police at trial.

* * *

Even though the court (erroneously) excluded third party guilty evidence as substantive evidence, the court has made clear that such evidence can be admissible for the purpose of impeaching of state witnesses, including the police. *See, e.g., State v. Fossick*, 508 S.E.2d 32, 33 n.1 (S.C. 1998) ("Even if this evidence is inadmissible as substantive evidence, however, it may still be admissible for

impeachment purposes."). Furthermore, the United States Supreme Court has held that a defendant may use evidence pointing to the guilt of another person to conduct cross-examination of the police regarding their failure to direct investigation against the other person and to attack "the thoroughness and even the good faith of the investigation . . ." *Kyles v. Whitley*, 514 U.S. 419, 442 n.13, 445 (1995); Def.'s July 30, 2000 Brief at 17; 2001 ROA p. 2052, l. 14 – p. 2055, l. 15.

In light of the precedent discussed above, the defense in the case at bar clearly had the right to cross-examine the York Police investigators regarding their credibility and the "thoroughness" and "good faith" of their investigation into Jimmy White, which were not only relevant but central to the issues in appellant's defense. . . .

Furthermore, appellant sought to question the York Police witnesses regarding the how and when they learned that Jimmy White had confessed to several people that he had committed the crimes charged against appellant, or that Jimmy White had been seen in the proximity of Ms. Stewart's apartment near the time the attack allegedly occurred. Appellant also sought to ask the York Police why, despite this evidence pointing to Jimmy White, the police failed to test Jimmy White's shoes against an unidentified foot print at the scene of the crime, and why they failed to test any of Jimmy White's clothes for the victim's blood. Through such questioning, the York Police witnesses should have been required to explain to the jury why they believe now

and believed during their investigation that no further investigation of Jimmy White was necessary.[13]

Through the use of extrinsic evidence, the defense should have been permitted to challenge the credibility of the York Police witnesses and their investigation. Instead, the jury was allowed to assume erroneously that the investigation into the Stewart attack was complete. The error violated appellant's right to due process under the fifth amendment and his rights under the sixth, eighth, and fourteenth amendments to the United States Constitution and article 1, § 3, § 14 and § 15 of the South Carolina State Constitution.

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13. The Jimmy White evidence is even more compelling than the third party guilt evidence that lead to the reversal of the conviction in *Kyles*. In that case, the state possessed evidence suggesting that a third party, nicknamed "Beanie," could have committed the murder for which the defendant was convicted. First, Beanie arguably fit a description of the perpetrator better than the defendant did. *See Kyles*, 514 U.S. at 442. Second, Beanie had made several inconsistent and suspicious statements to the police that "would have allowed the jury to infer that Beanie was anxious to see Kyles arrested for [the] murder." *Id.* at 445. Third, one of Beanie's statements to the police suggested that Beanie could have planted evidence against the defendant. See *id.* at 447-48. As noted above, the *Kyles* court concluded that the evidence of third party guilt regarding Beanie would have raised opportunities for the defense to conduct cross-examination of the police on their "failure to direct any investigation against Beanie," *id.* at 442 n.13, and to attack "the throughness and even the good faith of the investigation. . . ." *Id.* at 445. Furthermore, the court ruled that it is "reasonably probable" that the introduction of such evidence would have led to a result other than the defendant's conviction for capital murder. *Id.* at 441.

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QUESTION V

The lower court erred in excluding third party guilt evidence under Rule 804(b)(3), SCRE when the evidence was admissible under Rule 801(d)(1)(A), SCRE.

* * *

The lower court erred in excluding evidence of third party guilt under Rule 804(b)(3), SCRE when said evidence was admissible under Rule 801(d)(1)(A), SCRE in violation of the due process clause of the fifth amendment and in violation of the sixth, eighth, and fourteenth amendments to the United States Constitution and article 1, § 3, § 14 and § 15 of the South Carolina State Constitution.

QUESTION VI

The lower court erred in denying appellant's motion for a mistrial when the solicitor commented on the absence of third party guilt evidence (therein negating the very third party guilt evidence ruled inadmissible at trial) via remarks at closing regarding appellant's failure to call witnesses to prove that he was framed.

* * *

Due process guarantees a defendant's protection from closing arguments (by the prosecution) that shift the burden of proof from the state to the defense via impermissible comments on a defendant's failure to present evidence in his defense at trial as it is the prosecution's burden to establish

proof of guilt beyond a reasonable doubt. *Doyle v. Ohio*, 426 U.S. 610 (1976). One cannot comment on a defendant's exercise of a constitutional right, i.e., to put the state to the test of proving its case beyond a reasonable doubt. *Doyle v. Ohio*, *supra*; *Griffen v. California*, 380 U.S. 609 (1965). If a defendant presents no evidence, it is improper for the solicitor to comment on the defendant's failure to call a particular witness, but if the accused presents evidence the prohibition does not apply. *Douglas v. State*, 332 S.C. 67, 504 S.E.2d 307 (1998); *State v. Primus*, 341 S.C. 592, 535 S.E.2d 152 (2000); *State v. Pickens*, 320 S.C. 528, 466 S.E.2d 364 (1996).

Here, however, even though appellant presented evidence at trial, appellant was precluded from presenting third party guilt evidence. Therefore, the solicitor's argument to the effect that it was ludicrous to think appellant was framed because who else but appellant could be guilty violated *Doyle* because on the question of third party guilt, appellant was not allowed to present evidence (albeit an involuntary failure to present such evidence) on that topic. The proposition is that where a party lacks control over a potential witness the drawing of an adverse inference for failure to call such witness is improper. *Duckworth v. First Nat'l Bank*, 176 S.E.2d 297, 304 S.C. 563 (1970), interpreting *Davis v. Sparks*, 111 S.E.2d 545 (1959). When the state suggested that the defendant did not adequately justify the guilt of another individual, especially when the state knew the defendant could not call that individual as a witness, it had impermissibly shifted the burden of proof. Thus, the comments regarding the same were burden shifting, unconstitutional, and fundamentally unfair as appellant had numerous witnesses available to testify regarding third party guilt.

* * *

Appendix C

The lower court erred in denying appellant's motion for a mistrial when the solicitor shifted the burden of proof in denying guilt of others therein negating the very third party guilt evidence ruled upon as inadmissible evidence at trial in violation of the due process clause of the fifth amendment and in violation of the sixth, eighth and fourteenth amendments to the United States Constitution and article § 3, § 14, and § 15 of the State Constitution.

* * *

QUESTION VIII

The court committed reversible error by excluding third party guilt evidence from the penalty phase.

The court also committed reversible error by excluding third party guilt evidence from the penalty phase of the trial. ROA p. 4404, 11. 20-21. Pursuant to the sixth, eighth, and fourteenth amendments to the United States Constitution, article 1, § 3 and § 14 of the South Carolina Constitution, the South Carolina Code, and other applicable state and federal law, appellant was entitled to present this evidence during the penalty phase, regardless of whether such evidence was admitted during the guilt-or-innocence phase.

Evidence introduced during the penalty phase of a criminal case is not held to the same evidentiary standards utilized at the guilt-or-innocence phase.[23] For instance, in

23. *See, e.g., Green v. Georgia*, 442 U.S. at 96-97 (holding that exclusion of third party confession from punishment phase on hearsay (Cont'd)

Green v. Georgia, 442 U.S. 95 (1979), the Supreme Court found that the exclusion during the sentencing phase of evidence of third party guilt would constitute a due process violation, "[r]egardless of whether the proffered testimony comes within [the] Hearsay rule." *Green*, 442 U.S. at 97. Relying on *Lockett*, the *Green* Court reasoned that evidence that tended to show the guilt of another could not be kept from the sentencer. As in this case, the defendant in *Green* offered the testimony of a witness who had heard a person other than the defendant confess to the crime. The *Green* court determined that suppressing the testimony of a single witness to a third party confession constituted a denial of a

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grounds "constituted a violation of the due process clause of the fourteenth amendment," even though the evidence may have been properly excluded during the trial phase); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (In a capital case, "the eighth and fourteenth amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor* . . . any of the circumstances of the offence that the defendant proffers as a basis for a sentence less than death.") (finding capital punishment statute unconstitutional where it did not permit individual consideration of mitigating factors) (emphasis in original); *State v. Kornahrens*, 350 S.E.2d 180, 185 (S.C. 1986) ("The purpose of the bifurcated proceeding in a capital case is to permit the introduction of evidence in the sentencing proceeding which ordinarily would be inadmissible in the guilt phase.") (citation omitted); *see also Hitchcock v. Dugger*, 481 U.S. 393 (1987) (exclusion of mitigating evidence not enumerated in the statute was prejudicial error); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (finding error where trial court excluded evidence of defendant's ability to adapt to prison environment); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (finding reversible error where sentencing judge refused to consider evidence of defendant's violent upbringing).

fair trial to the defendant. *Green*, 442 U.S. at 97 (vacating sentence because of exclusion of single witness). In the present case, the court suppressed the testimony of multiple witnesses to Jimmy White's confessions, in addition to testimony that placed Jimmy White in close proximity to the scene of the crime near the time it took place and that tends to show that Jimmy White lied to the police about his alibi, in addition to other evidence pointing to Jimmy White.

The United States Supreme Court has held that, with regard to constitutional rights that directly affect the ascertainment of guilt, a rule of evidence "may not be applied mechanistically to defeat the ends of justice." *Chambers*, 410 U.S. at 302 (holding that defendant's constitutional rights were violated by the exclusion of hearsay evidence tending to show that a third party fired the shot that killed the victim) (emphasis added).[24] Through its arbitrary misapplication of the hearsay rule to exclude all third party guilt evidence from this case, the court clearly violated the United States Supreme Court's holding in Chambers.[25]

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24. See also *Crane*, 476 U.S. at 690 (A criminal defendant's opportunity to be heard "would be an empty one if the State were permitted to exclude competent, reliable evidence . . . when such evidence is central to the defendant's claim of innocence.").

25. Even if the Jimmy White confessions were inadmissible hearsay (which they are not), the court's "mechanistic" application of the hearsay rule to exclude all Jimmy White evidence from consideration by the jury in this case would have still resulted in a violation of appellant's constitutional rights under *Chambers*. For a discussion of the constitutional arguments discussed below, ROA pp. 2034-35, 3656.

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Chambers is strikingly similar to the present case. In *Chambers*, the defendant (who was convicted of murder), was not permitted by the trial court to call three witnesses, each of whom would have testified that a third party admitted on separate occasions that he actually committed the murder. The trial court excluded the statements as hearsay and the Mississippi Supreme Court affirmed. However, the U.S. Supreme Court reversed, holding that the exclusion of these statements contributed to a denial of the defendant's right to a "trial in accord with traditional and fundamental standards of due process." *Chambers*, 410 U.S. at 302.

It is well-settled that criminal defendants have a constitutional right under the sixth amendment to have "compulsory process for obtaining witnesses in his favor," which is guaranteed in the criminal courts of the states by the fourteenth amendment.[26] This constitutional right has been described by the United States Supreme Court as follows:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide

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26. See *Washington v. Texas*, 388 U.S. 14, 17-19 (1967) (holding that a defendant's constitutional right of compulsory process was violated by the application of a Texas law rendering an accomplice incompetent to testify for criminal defendants); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (concluding that the constitution guarantees criminal defendants a "meaningful opportunity to present a complete defense") (citations omitted).

> where the truth lies. *Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.*

Washington, 388 U.S. at 19 (emphasis added); *see also Chambers*, 410 U.S. at 302 ("*Few rights are more fundamental than that of an accused to present witnesses in his own defense.*") (emphasis added).

The sixth amendment also guarantees the right of a criminal defendant "to be confronted with the witnesses against him." Indeed, a primary interest secured by the confrontation clause is the right of cross-examination. *See Davis v. Alaska*, 415 U.S. 308, 315 (1974). This right to cross-examine the state's witnesses "helps assure the accuracy of the truth-determining process." *Chambers*, 410 U.S. at 295. The right to cross-examination is "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Id.* Furthermore, a criminal defendant's due process rights, which are guaranteed by the fourteenth amendment to the United States Constitution, include "the right to a fair opportunity to defend against the state's accusations."[27] *Chambers*, 410 U.S. at 294.[28]

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27. This Court has also recognized the significance of a defendant's right of confrontation. *See, e.g., State v. Sparkman*, 339 S.E.2d 865, 867 (S.C. 1986) (citing *Davis v. Alaska*, 415 U.S. 308 (1974)) (reversing conviction in which defendant was precluded from cross-examining state witness on the witness's juvenile record). Furthermore, the constitutional rights discussed above are also

(Cont'd)

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In light of the constitutional standards set forth above, the court clearly violated appellant's constitutional rights by preventing him from calling witnesses regarding third party guilty evidence and cross-examining the state's witnesses on this issue.

First, the court's "mechanistic" reliance on the hearsay rule to prevent a jury from considering this reliable and

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guaranteed by the constitution of the State of South Carolina. *See* e.g., S.C. Const. art 1, § 3 (No person shall be "deprived of life, liberty, or property without due process of law . . ."); S.C. Const. art 1, § 14 ("The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to be fully heard in his defense by himself or by his counsel or by both.").

28. Moreover, the jury's paramount role in capital cases was recently reemphasized by the Supreme Court in *Ring v. Arizona*, 122 S.Ct. 2428 (2002). Holding that aggravating facts must be found by a jury and not a judge, the court made clear in *Ring* that, when analyzing the sixth amendment right to a jury trial, a practical, common-sense approach must prevail over a formal, technical application of the law. Clearly the trial judge in appellant's case failed to take such an approach, by excluding from the jury all evidence related to Jimmy White's guilt. That decision had the obvious effect of denying appellant the right to have a jury determine all relevant and material evidence before convicting him of murder. This unconstitutional deprivation cannot be tolerated, especially in a capital case. As Justice Scalia observed in *Ring*, "We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it." 122 S.Ct. at 2445 (Scalia, J., concurring).

compelling evidence of third party guilt evidence certainly violated appellant's sixth amendment right to a jury trial and "defeat[ed] the ends of justice." *Chambers*, 410 U.S. at 302.[29] Simply put, it defeats the ends of justice to allow a jury to convict a man of murder and sentence him to death without hearing evidence that another specified man has confessed to the crime on multiple occasions, was observed near the scene of the crime, apparently lied to police about his alibi, and arguably better fit the description of the attacker than the defendant did.

Second, in light of the quality and quantity of the third party guilt evidence, the court's application of the *Gregory* standard in this case amounts to a per se rule against the introduction of third party guilt evidence, which is clearly unconstitutional.[30]

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29. Nor surprisingly, the court denied the fact that its ruling meant that the South Carolina Rules of Evidence trumpted appellant's constitutional rights. See ROA p. 3656, ll. 7-16 ("THE COURT: Well, I'm just saying those are the rules and our court has interpreted them, and particularly that they are the Rules of Evidence. *I'm not going to say they are trumping anything. I'm just making a ruling.*") (emphasis added).

30. *See Rock v. Arkansas*, 483 U.S. 44, 61 (1987) ("A state's legitimate interest in barring unreliable evidence does not extend to per se exclusions that may be reliable in an individual case."); *see also Washington*, 388 U.S. at 22 ("It is difficult to see how the constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of a prior categories that presume them unworthy of belief.").

Third, the *Gregory* standard, as applied by the court, prevented the jury from considering relevant and material evidence that could create reasonable doubt of the defendant's guilt. This court has held that such a result is unconstitutional.[31] ROA p. 2021, ll. 11-17.

Fourth, the court violated appellant's constitutional right to present a complete defense because of the court's express bias against defendants who present evidence pointing to another person as the perpetrator. Indeed, in a moment of candor, the court revealed its prejudicial skepticism concerning third party guilt evidence:

> THE COURT: . . . And another thing that's overlaid with this, and I know I tell the jury they can't go outside the record, and I know the court can't go outside the record either, but — and this is this thing of a *somewhat pervasive occurrence now of individuals confessing to those events to which others have been found guilty.*

ROA p. 2021, ll. 11-17 (emphasis added).[32]

31. *See, e.g., State v. Osborne,* 345 S.E.2d 256, 258 (S.C. Ct. App. 1986) ("The proper standard of materiality [of evidence that was not disclosed by the State after *Brady* motions] must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. *It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed.*") (emphasis added) (quotation omitted).

32. See also *Id.* at 2026, ll. 19-23 ("Well, but here you have that, the *nagging testimony* by individuals who, if testifying for the

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Appendix C

The exclusion of third party guilt evidence violated appellant's rights under the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution and article 1, § 3, § 14, and § 15 of the South Carolina Constitution.

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state, would be called snitches; *if they are testifying for the defense, they would be called saints*, who say that they heard these statements [confessions by the third party, Jimmy White].") (emphasis added). The *Gregory* test specifically calls for an "unbiased judicial inquiry." *Gregory*, 16 S.E.2d at 535.

APPENDIX D

PETITIONER'S FINAL REPLY BRIEF TO THE SOUTH CAROLINA SUPREME COURT

ARGUMENTS RELATED TO THE EXCLUSION OF THIRD-PARTY GUILT EVIDENCE DURING THE GUILT PHASE OF TRIAL

* * *

II. The State has failed to rebut the Appellant's argument that the lower court erred in excluding all evidence of third party guilt.

In an effort to support the trial judge's decision to exclude all evidence of third party guilt from this trial, the State makes several misleading arguments that are flatly contradicted by the proffered evidence pointing directly to a specific person, James McCaw White, as the perpetrator of the specific crime charged.[2] As explained below, the State simply fails to address the trial judge's significant legal errors that led to the exclusion of third party guilt evidence, which resulted in a violation of the South Carolina Rules of Evidence, South Carolina Supreme Court precedent, United States Supreme Court precedent, and the Constitutions of South Carolina and the United States.[3]

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2. As demonstrated in the Appellant's Initial Brief and below, the trial judge erroneously excluded this evidence despite his earlier findings that the proffered evidence was credible.

3. *See* constitutional arguments made in Appellant's Initial Br. at 38-43, which are incorporated by reference herein.